IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO.6735 OF 2005

M/s.Graphite India Limited — Petitioners
vs.
Union of India & ors. — Respondents

Mr.Vikram Nankani i/b.Mr.Madhur Baya for the petitioners.

Mr.A.S.Rao with Mr.Anurag Gokhale for the respondents.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 17th March, 2006

P.C.

Heard Mr.Vikram Nankani, the learned counsel for the petitioner and Mr.A.S.Rao, the learned counsel for the respondents.

2. The petitioner made an application for Value Based Advance Licence in the month of March, 1995 for import of Electrode Grade Calcined Petroleum Coke, Special Impregnating Pitch and Coal Tar Pitch. The petitioner was granted licence for import of the aforesaid items duty free against the export of Graphite Electrode/Nipples. The petitioner was also issued a Duty Exemption Entitlement Certificate (DEEC book). The petitioner claims to have completed 100% export obligation between May, 1995 and November, 1995.

Admittedly, no imports were made by the petitioner against the said licence and the licence got expired on 28th March, 1996. Initially, by the order dated 8th February, 1999, the application for revalidation of licence was dismissed, but on subsequent application, the licence was revalidated upto 26th February, 2002. The petitioner claims to have imported the aforesaid material during September/December, 2001. The imports were made at the international rates prevalent during this period. There appears to be no dispute and rather it is admitted case of the petitioner that the rates during the period of import (September/December, 2001) were much lower than the rate prevailing at the time of the submission of the application. The petitioner requested the Customs authorities for audit of DEEC book in respect of the Advance licence dated 29th March, 2005 issued to him. The audit of DEEC book has not been done by the Customs Authorities. At the same time, the petitioner has been issued a show cause notice dated 6th July, 2005 by the Office of the Joint Director General of Foreign Trade under Section 11 for violation of the provisions of the Foreign Trade (Development and Regulation) Act, 1992 on the basis of the information by the Customs Authorities as the variation between the price declared to the Licensing Authority and the price declared at the time of import exceeded 20%.

3. By means of this writ petition, the petitioner seeks to challenge the show cause notice dated 6th July, 2005 issued by the Joint Director General of Foreign Trade. The petitioner also prays for issuance of writ of mandamus to the respondent no.4 directing him to log in and audit the DEEC book pertaining to post Advance Licence dated 29th March, 2005.

4. In opposition to the writ petition, reply affidavit has been filed by the Joint Director General of Foreign Trade as well as by the Commissioner of Customs (Exports).

5. In his affidavit, the respondent no.4 has stated that in so far as the import of Electrode Grade Calcined Petroleum Coke/Pitch Coke by the petitioner is concerned, in terms of value, the variation is 21.48%. As regards the import of special Impregnating Pitch and Coal tar pitch by the petitioner, in terms of value, the variation is 56.62%. In terms of the quantity the variation, according to the respondent no.4, exceeds 75%. The respondent no.4 has stated that as the variation in the price was more than 20% between the price declared before the Licensing Authority and price declared at the time of actual import, the DEEC book could not be audited.

6. Having heard Mr.Vikram Nankani, the learned counsel for the petitioner and Mr.A.S.Rao, the learned counsel for the respondents, we are of the view that in so far as the issuance of notice dated 6th July, 2005 by the Joint Director General of Foreign Trade is concerned, the same does not deserve to be quashed at this stage as issuance of that notice cannot be said to be without jurisdiction. The defence the petitioner has, has to be shown in response to the said show cause notice to the Joint Director General of Foreign Trade. As a matter of fact, Mr.Vikram Nankani, the learned counsel for the petitioner did not pursue the matter further in so far as the quashing of the show cause notice dated 6th July, 2005 was concerned. His main thrust of argument was that the respondent no.4, despite number of reminders by the petitioner, has not been auditing/logging the DEEC book. He referred to the various letters written by the petitioner to the respondent no.4.

7. It does appear from the available material that the petitioner has been writing to the respondent no.4 to complete auditing and logging the DEEC book so that the petitioner could submit the same before Director General of Foreign Trade.

8. On 2nd March, 2005, the petitioner made the following representation to the respondent no.4:

"GIL.EXP:2005
March 2, 2005

Mr.N.K.Bhujbal,
Commissioner of Customs (Export),
Jawahar Customs House,
Nhava Sheva

Sir,

Re: Audit of DEEC Book No.160459
Adv.Lic.No.0300400 dt.29.03.95.

This is further to our letter No.GIL:EXP:2005 dt.Jan.20.2005 and the personal interview we had with you on 24.02.05. We thank you very much for the courtesy extended to us during our interview.

At the outset we wish to draw your kind attention to circular No.23/96 Cus. dated 19/4/96 (copy enclosed.. Annex-1). From the contents of the circular, it is very clear that -

a. The Govt. has envisaged that there would be cases where the variation between the price declared to the Licensing Authority and price declared at the time of actual import may exceed 20%.

b. In such cases, the circular envisages that the importer must be given an opportunity to substantiate such valuation and justify that the CIF prices declared in the application before the Licensing authorities were the then prevailing international prices.

Thus, what is required to be established is that the declared application rates were not substantially different than the then prevailing international prices.

As explained to you on 24/2/05, we wish to bring to your notice the following:

i. There has been a huge time lag between the licence application date (March 1995) and the period of actual imports

(Sept. - Dec.2001). **You will appreciate that 6.1/2 years is too long a period during which price fluctuations beyond a specified percentage cannot occur.**

ii. The extension of validity of the licence was allowed as per Govt. laws.

iii. Prices did drop due to severe dip in demand for end products which resulted in dip in international prices for raw materials. The emerging Chinese market for our final products also contributed to the fall.

We are submitting herewith the proofs justifying the international prices prevailing just prior to March 1995 (application date) for the three raw materials imported by us.. Annex-2.

i. **Calcined Petroleum Coke**:

. Certified xerox copy of Bills of Entry (1 No.) in respect of imports made by us during February 1995 and data from 'International Business Information Services'. It would be observed that the rate varied between US$672.69 & US$ 704. Our licence application rate was US$704.35.

ii. **Special Impregnation Pitch:**

. Certified copy of Bill of Entry (1 No.) in respect of imports made by us during January 1995 and data from Directorate General of Commercial Intelligence & Statistics. It would be observed that the rate varied from US$675 to US$959.61. Our Licence application rate is US$758.47.

iii. **Coal Tar Pitch**:

. Data from Directorate General of Commercial Intelligence & Statistics. It would be observed that the rate varied from US$675 to US$959.61. Our Licence application rate is US$797.708.

A statement giving aforesaid details is enclosed as Annexure-1. You will appreciate that in the said Value Based Licence, the total variation between total application value and the total evidence value (based on lowest and highest rates) range between 7.97% to 9.31%.

In addition we are furnishing the following:

1. Price justification based on the international prices prevalent at the time of actual import.

. " " Annex. 3.

2. Price justification to prove the decline in international prices of our finished product. Here we have taken one shipping bill of 1995 covered under the Advance Licence with the price of another shipment to the same customer during 2001 under same terms and conditions where the prices have gone down by 22.4%. . Annex 4.

We have attempted to furnish you the proofs justifying what is required by the aforesaid circular, we hope it would be of help to understand the peculiar facts of our case and arrange to log off the DEEC Book for submitting to DGFT.

Should you require any further clarification, kindly inform. We shall be pleased to submit the same in writing or through representations/personal appearances in hearings, as may be desire/directed by you.

Thanking you,

Yours faithfully,
for GRAPHITE INDIA LIMITED
Sd/-
A.CHANDRAN
DY.MANAGER (EXPORTS)."

9. The respondent no.4, though in his reply before this Court, has tried to justify non-logging in DEEC book as, according to him, the variation in the value of the

import exceeded 20%, in our considered view, he ought to have considered the representation made by the petitioner and passed an appropriate order thereon. If the respondent no.4 was satisfied by the reasons set out in the representation aforenoticed for variation, obviously, he was supported to log in the DEEC book so that the petitioner could submit the same before the Director General of Foreign Trade. On the other hand, if the reasons set out in the representation dated 2nd March, 2005 were not satisfactory and the logging in DEEC book could not be done, he should have passed the order accordingly and communicated the same to the petitioner to enable the petitioner to pursue appropriate remedy in challenging the same in accordance with law.

10. For what we have discussed above, we are satisfied that the writ petition may be disposed of by the following order:

(i) The respondent no.4 shall consider the petitioner's representation dated 2nd March, 2005 and after hearing the petitioner, pass an appropriate order thereon within three months from the date of the receipt of this order.

(ii) All contentions raised by the petitioner in the writ petition are kept open to be agitated in appropriate proceedings in case the respondent no.4 rejects the petitioner's representation dated 2nd March, 2005 and refuses to log in the DEEC book.

(iii) Until the disposal of the representation by the respondent no.4 and four weeks thereafter from the date of the communication of the said order to the petitioner, the respondent no.3 shall not pass final order pursuant to the show cause notice dated 6th July, 2005.

. No costs.

(R.M. LODHA,J.)

(J.P. DEVADHAR,J.)